

**MICHAEL PRESLEY**  
Claimant

**VENATOR GROUP**  
Respondent

**LUMBERMENS MUTUAL CASUALTY COMPANY**  
Insurance Carrier

<sup>1</sup> See K.S.A. 1999 Supp. 44-510d(a)(13).

Claimant appeals and contends he proved he suffered bilateral shoulder injuries while employed by the respondent and he is entitled to a whole body injury instead of a scheduled injury as found by the ALJ.<sup>2</sup> Thus, the claimant argues the whole body injury entitles him to permanent partial general disability benefits and he has proved a work disability.<sup>3</sup> Additionally, claimant argues that the ALJ erred, in admitting Dr. Truett Swaim's February 29, 2000, Independent Medical Examination report, as part of the record for the final award without his testimony.

In contrast, respondent requests the Board to affirm the Award. The respondent argues claimant only proved he suffered a left shoulder injury while working for the respondent. Thus, respondent argues claimant's permanent partial disability is limited to a left arm and left shoulder injury as set out in the scheduled injury provisions of the Workers Compensation Act.<sup>4</sup>

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record, considering the briefs and the parties' arguments, the Board makes the following findings and conclusions:

The Board finds the Award should be affirmed. The Board agrees with the ALJ's analysis of the evidence as set forth in the Award. In particular, the Board finds the opinion of claimant's treating physician, orthopedic surgeon Dr. Daniel T. Hinkin, on medical causation is the most persuasive opinion and should be given the greatest weight in determining whether claimant's right shoulder problems are related to his work while employed by respondent.

Between March 4, 1999, and January 12, 2000, Dr. Hinkin saw claimant 11 times. Dr. Hinkin's medical records do not indicate that claimant mentioned symptoms in his right shoulder until May 17, 1999. At that time, claimant had not worked since February 2, 1999, and before February 2, 1999, claimant had only returned to work for a few days after a two month voluntary leave of absence for personal reasons not related to his work. During Dr. Hinkin's deposition testimony, he was asked whether claimant's work had any relationship to his right shoulder complaints. Dr. Hinkin replied, "His pain that he noted to me was onset while he was [sic] wasn't working at Venator, and it is hard for me to correlate right shoulder pain to something that happened at that work site when he was not working at that site at the time of the onset."<sup>5</sup>

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<sup>2</sup> See *Downes v. IBP, Inc.*, 10 Kan.App.2d 39, 691 P.2d 42 (1984).

<sup>3</sup> See K.S.A. 1999 Supp. 44-510e(a).

<sup>4</sup> See K.S.A. 1999 Supp. 44-510d(a)(13).

<sup>5</sup> Hinkin Depo. at 35.

Claimant's testimony on the issue of causation for his right shoulder problems was inconsistent and, therefore, not persuasive. First, claimant was asked, "How was your health before February 1999?" Claimant answered, "Awesome."<sup>6</sup> In contrast, claimant answered, "Yes," when he was asked if he had any pain or weakness in his shoulders before he was on voluntary leave for two months before he returned to work in February 1999.<sup>7</sup> Also, claimant testified he had a slight right shoulder problem at the same time his left shoulder froze up on February 2, 1999.<sup>8</sup> Claimant later testified his right shoulder symptoms worsened at the end of March 1999.<sup>9</sup> But during the period from February 2, 1999, to the end of March 1999, claimant was not performing his work duties to worsen his right shoulder symptoms. At one point, claimant testified he had continually told Dr. Hinton about his right shoulder problems.<sup>10</sup> But claimant was then asked if he described right shoulder pain to the doctor. Claimant answered, "No."<sup>11</sup>

The Board concludes the record supports a left shoulder injury but does not support a right shoulder injury.

The ALJ admitted Dr. Swaim's Independent Medical Examination report into the record for the final award without Dr. Swaim testifying. Dr. Swaim examined claimant at claimant's attorney's request and the report was admitted into evidence at the July 19, 2000, preliminary hearing. The parties agreed to the admission of the preliminary hearing transcript as part of the record for the final award. But the parties did not stipulate to the inclusion of Dr. Swaim's Independent Medical Examination report without his deposition testimony. Claimant objects to the admission of the report without Dr. Swaim's deposition testimony and without the parties specifically stipulating to the admission of the report for the final award.

The Board finds that Dr. Swaim's Independent Medical Examination report is inadmissible and should not be made part of the record for the final award. Medical reports shall be considered by the ALJ at the preliminary hearing but the reports shall not be considered as evidence when the ALJ makes a final award unless all parties stipulate to the admission or the report is supported by the physician's testimony.<sup>12</sup>

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<sup>6</sup> P.H. Trans. at 26.

<sup>7</sup> R.H. Depo. at 8.

<sup>8</sup> P.H. Trans. at 11.

<sup>9</sup> P.H. Trans. at 12.

<sup>10</sup> P.H. Trans. at 11-12.

<sup>11</sup> R.H. Depo. at 10.

<sup>12</sup> K.A.R. 51-3-5a(a).

In conclusion, the Board further agrees with the findings of fact and conclusions of law that are set forth in the Award. It is not necessary to repeat those findings and conclusions in this Order. Thus, the Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein. As noted above, however, the ALJ's findings in reference to Dr. Swaim's Independent Medical Examination report are not adopted by the Board.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Board that ALJ Bryce D. Benedict's January 4, 2002, Award should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2002.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

cc: Michael H. Stang, Attorney for Claimant  
Michelle Daum Haskins, Attorney for Respondent  
Bryce Benedict, Administrative Law Judge  
Director, Division of Workers Compensation